SERVED: May 15, 1992

NTSB Order No. EA-3558

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 30th day of April, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

Docket SE-9110

LARRY L. SMITH,

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on April 27, 1989, following an evidentiary hearing.[1] We deny the appeal.

The order of suspension (complaint) charged that, on August 5, 1987, while acting as pilot-in-command ("PIC") of N182TF, a Cessna Model 182, respondent allowed the aircraft to enter the Detroit Metropolitan Airport Terminal Control Area ("TCA") without having first received permission to do so. Allegedly,

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[1]The initial decision, an excerpt from the hearing transcript, is attached.

respondent had admitted that he had no TCA chart in the aircraft. As a result, he was charged with violations of 91.90(b)(l)(i), 91.5, and 91.9 of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91).[2] The Administrator imposed a 90-day suspension of respondent's private pilot certificate. The law judge affirmed the complaint in full.

Respondent, appearing pro se throughout the proceeding, raises procedural and substantive challenges to the law judge's decision. His procedural challenges stem primarily from his lack of familiarity with Board and trial procedures. It is not the

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[2]FAR section 91.5 (currently 91.103) provided, in part:

> Each pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight.

§ 91.90(b)(l)(i) (now 91.131), as pertinent, read:

> Flight in terminal control areas.
>
> (b) Group II terminal control areas -
>
> * * *
>
> (1) Operating rules. No person may operate an aircraft within a Group II terminal control area designated in Part 71 of this chapter except in compliance with the following rules:
>
> (i) No person may operate an aircraft within a Group II terminal control area unless he has received an appropriate authorization from ATC prior to the operation of that aircraft in that area. . .

§ 91.9 (now 91.13(a)) read:

> Careless or reckless operation.
>
> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Board's duty to ensure that respondents appearing pro se have all necessary information and background and, contrary to his contention, there is no basis to conclude that respondent was not sent the C.F.R. materials described in the Board's April 21, 1988 letter.

We also see no reason in the record to conclude that the law judge unduly hurried the proceedings or otherwise denied respondent due process through confusion of the testimony.[3] Similarly, respondent is unaware that, to sustain a § 91.9 violation, the Administrator need not prove harm. The potential for endangerment is enough, and that is clear in the case of any TCA incursion. Administrator v. Demar, 5 NTSB 14129 (1986) (TCA incursions create an unacceptable potential for hazard); and Haines v. Department of Transportation, 449 F.2d 1073 (D.C. Cir. 1971) (§ 91.9 is designed to Promote safety and uniformity in commercial flight and to induce compliance with traffic controls; proof of actual danger is unnecessary).[4] Overall, and because respondent was representing himself and was not an attorney, he was given considerable leeway by the law judge.

There is no real dispute that the aircraft entered the TCA

[3]The law judge's comments were directed to avoiding unnecessary delays.

[4]We agree with respondent and the Administrator that there was no basis for the law judge's finding that respondent regularly flew in the area (Tr. at 163), and vacate that statement. It does not, however, compromise the remainder of the decision.

without permission, and the law judge so founds Respondent's suggestion that part of the fault lay with the controllers, who should have directed the aircraft to steer clear and should have provided a clearance more quickly, is not well taken. There is no basis in this record to conclude that the controllers contributed in any manner to the incursion.

The heart of respondent's appeal is his continued claim that he was not the pilot of the aircraft. At the hearing, respondent and one of the passengers, his receptionist and friend, testified that another passenger, a Mr. Ruddy, performed all pre-flight and flight operations. Respondent offered extensive testimony regarding why he would not have participated, including the fact that he was not certified for-high performance aircraft such as N182TF and was wholly unfamiliar with it. Mr. Ruddy testified for the Administrator. He denied that he had been PIC, noting that he had no medical certificate at the time. When pressed, he could not recall details of the flight.

Regardless of the Board's view of the record or its own impression of the credibility of particular witnesses, which witnesses are to believed is a question best left to the law

[5]Respondent seeks reopening on the ground that he did not receive a sufficient portion of the tower tape to provide "altitude VFR flight levels for clouds." Respondent does not explain of what use he would put such information. In any case, our rules do not authorize the consideration of motions to reopen for new evidence at this stage of a proceeding. See 49 C.F.R. 821.57(d). The time to have raised this matter was prior to the hearing, in a motion to compel production of documents. We also note that respondent did not develop this issue through objection or testimony at the hearing.

judge, who has had the opportunity of personally observing all of them. See Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge). The law judge's credibility choices "are not vulnerable to reversal on appeal simply because respondent believes that more probable explanations. . were put forth...". Administrator v. Klock, NTSB order EA-3045 (1989), slip opinion at p. 4. We cannot find that the law judge's assessment was without foundation in the record or otherwise arbitrary or capricious.

We are also compelled to deny respondent's request that we reopen the proceeding to consider new evidence from the owner of the aircraft -- evidence that allegedly will confirm respondent's version of events. As discussed above (see footnote 5), reopening for new evidence does not lie at this stage and, in any event, respondent has not shown that this evidence, (or this witness) could not have been produced at the hearing and is truly "new matter" within the meaning of 49 C.F.R. 851.57(d). See Administrator v. Chirino, 5 NTSB 1669 (1987), and 49 C.F.R. 821.50(c).

As to the § 91.5 finding, respondent argues that maps were available, including the Detroit sectional. Neverthelesss, § 91.5 requires that pilots familiarize themselves with all available information considering the flight; this would certainly include TCA boundaries. There is no evidence in the

record to demonstrate familiarity with the Detroit Metro TCA, and the law judge's finding of a § 91.90(b)(l)(i) violation, in and of itself, proves otherwise.[6] Thus, this finding is adequately supported in the record.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The initial decision is affirmed; and

3. The 90-day suspension of respondent's private pilot certificate shall begin 30 days from the date of service of this order.[7]

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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[6]The Administrator cites two cases for the proposition that § 91.5 requires not just familiarity with available information but that necessary charts be in the aircraft. Although we need not reach this issue, we note that the first case, Administrator v. Helter, 5 NTSB 826 (1985), contains language that could be read to support the Administrator's position. This meaning was not intended. In that case, respondent was also charged with violating § 91.183 (now 91.503), which requires navigational charts in the aircraft, and the discussion encompassed both claims. The second case, Administrator v. Hillman, 5 NTSB 803 (1985), which, like Helter, involved a 91.183 claim as well, does not anywhere suggest that § 91.5 requires maps in the cockpit. Although not having them could certainly lead to a § 91.5 violation, we are unaware of Board precedent adopting the interpretation advanced here, nor is such an interpretation obvious from the language of § 91.5.

[7]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).